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# File No. O. Leases / 47

Legal - DEPARTMENT

A - BRANCH

**Subject:—** Opinions in connection with leases.

P.67 / E

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No. 1506

Office of the
Remembrancer of Legal Affairs.

Bombay Castle. 22nd February 1947.

To
The Collector of Bombay.

Subject :- Re: Acquisition of property bearing C.S. No. 1399 of Mahim Dn.

Sir.

With reference to your letter No. L.A.C. 163. dated the 3rd February 1947. in connection with the subject noted above, I have the honour to observe as follows:-

"The lease may contain a covenant for renewal. that is, a covenant to grant a renewal of the lease either at the end of the term or at some stated period within the term.. Such a covenant confers an immediate right to a further term. and as the covenant runs with the land it is exercisable by the assignee of the lessee and binds the assignee of the lessor" " (See Mulla's Transfer of Property Act. p. 637). In the present case, the lease contains a covenant for renewal and consequently Government would be bound to renew the lease on receipt of a notice in writing for the purpose from the lessee. Government would not therefore be entitled to resume the land leased by them on the expiry of the first term of lease notwithstanding the renewal clause continuing the lease for a further period of fifty years.

Your obedient servant,

D.V.Vyas.

O.C. Remembrance-r of Legal Affairs.

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The question is now governed by the law applicable to leases, and not by the law relating to requisition. In the absence of a contract to the contrary the lessee can pay Government assessment or ground rent or rates and taxes payable by the lessor and reimburse himself either by deducting the amount paid with interest from the rent or by counter claim to the lessor's suit for rent (see clause (g) of section 108 of the Transfer of Property Act). In the present case Government as lessee is primarily liable to pay the municipal tax and urban immoveable property tax (see section 146(3) of the City of Bombay Municipal Act, 1888 and section 26(1) of the Bombay Finance Act, 1939). Consequently unless the lease provides to the contrary Government will have to pay both the municipal tax and the urban immoveable property tax. Whether the proposed lease in renewal should so provide to the contrary in addition to the payment of full standard rate is a question of policy for the department to decide.

P.M.Lad
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C.C. Remembrancer of Legal Affairs.

U.R. to H.D.No. 48/70 , dated the 13th May 1947.

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It is presumed that leases of lands to (a) the Bombay Presidency Trades Association Ltd., (b) The Young Men's Christian Association, (c) the Princess Victoria Mary Gymkhana, (d) the Hindu Gymkhana, (e) the Islam Gymkhana, (f) the Parsee Gymkhana, (g) the Catholic Gymkhana and (h) the Bombay Gymkhana have been properly executed. If so, these leases cannot be terminated otherwise than as provided therein. In none of these leases has ~~any~~ provisions been made requiring the lessee to admit members of all communities without discrimination. Consequently these clubs and Gymkhanas which are members' clubs cannot be forced to throw their doors open to members of all communities on pain of cancellation or termination of these leases. The view taken by the Revenue Department in this respect is correct.

It appears that plots of land between the Wodehouse Bridge and the Victoria Swimming Bath have been allotted for Tennis Court to (1) the High Court Sports Club, (2) the Zorostrian League, (3) the Sydenham college of Commerce, (4) the Anglo Scottish Education Society, (5) the Muslim Student s' Union and (6) the Royal Institute of Science subject tothe conditions mentioned in G.R. R.D., No. 2851/33, dated 16-10-1936 read with para. 2 of G.R.(R.D.) No. 2951/33, dated 4-2-1935. Under condition (b) these plots are ~~resumable~~ resumable resumable by Government whenever required. Consequently it would be competent for Government to resume these plots if they are required by Government; but resumption of these plots by Government on the ground that members of all communities are not admitted by the grantees would not be valid. The view taken by the Revenue Department in respect of these grants is not correct.

Sd/- P.M.LAD
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O.C. Remembrancer of Legal Affairs.

U.R. to R.D. No. 5062, dated the 17th May 1947.

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Below U.R. Ref. No. 4293, dated 29th April 1947 (The Muslim Musaffarabad Hall) in File No. C.R.VII-A.

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Returned with compliments.

2. The questions under consideration are summarised at p.p. 161-162.

3. In our opinion the tenancy agreement in this case is represented, as to the offer, by the telephone conversation of the 3rd August 1943, 1943, from Messrs. Dallas & Co. to the controller of Rationing, and, as to the acceptance, by that letter. Unless, by reason of what was said in that covensation there was any agreement to the contrary, the Landlords could never be under any legal liability to make any repairs.

referred to in the letter dated 4th August

4. It might possibly be argued, but we do not think with any force, that the letter dated 4th August 1943 represents the offer and that the letter dated 24th August 1943, to Messrs. Dallas & Co. from the Controller of Rationing, comprises the acceptance of that offer. Even if this represents the correct construction of events, the position of Govern.ent is in no way strenghhened by reason of the words, in the concluding paragraph of the ~~words in the~~ letter of the 24th August 1943, "The rent is inclusive of the owners liability for repairs to the premises and payment of all taxes". For, in the particular circumstances of the case what is the extent of that liability provided for in the rent? It amounts to nothing.

5. We should perhaps point out that the papers submitted do not show that the Landlords, at any stage, agreed to carry out the repairs in question or admitted liability for them. The control er of Rationing wrote to the Landlords, on 2nd September 1946, -- reporting a deficiency in the electric installation which had caused certain persons to receive a shock when they touched one of the lamp posts on which the over-head wires rested. He asked the Landlords to get the necessary repairs to the installation carried out i.e. repairs to remedy the deficiency-- reported- and this liability they agreed to meet - not repairs necessary to maintain the electric installaction and lights and fans in working order.

6. In addition, the mandatory provisions of Sect. 175(3) of the Government of -- India Act 1935 have not been observed.

7. For the above reasons, we are unable to agree with the view expressed in the note dated 28th April 1947 and we are of the opinion that the Trustees of the Muslim Musaffarabad Hall are not legally bound to carry out the repairs in question.

Sd/-

Solicitors to Government.

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The opinion of the Solicitors to Government who were consulted is forwarded herewith.

Although I do not fully endorse the view expressed by the Solicitors it appears that in view of the fact that there is no lease in writing in conformity with the provisions of section 175(3) of the Government of India Act, 1935 and that there is no express agreement that Lessors should carry out repairs it is difficult to say what view the court is likely to take particularly when the costs of repairs estimated by the Executive Engineer are disproportionate to the rent of the premises. It appears from the letter of the Solicitors for the lessors at page 137 that what the lessors dispute is their liability to do alterations or additions or to renew the electric installation ~~or additions or to renew the electric installation~~ or wiring. Possibly the lessors may agree to carry out ordinary repairs. Consequently the Controller of Rationing may negotiate a settlement with the landlords for their liability to ~~out~~ carry out ordinary repairs.

Sd/- P.M.Lad.
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U.H. to C. of R. No. 5827, dated the 4th June 1947.

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Condition 4 of the agreements in the old Form executed by Messrs. Hussenaab, Chandsab , Rayappa and Sambrani provides:

> "I will not alienate the plot to non-backward classes without the previous sanction of the Collector.";

and condition 7 provides for the forfeiture of the holding in the event of contravention of any of the conditions . The question raise raised for the consideration of the R.L.A. is whether the lease of a building on such plot involves contravention of condition 4 .

It is true that "land" as defined in section 3(4) of the Land Revenue Code, 1879 includes a building while "building site" as defined in section 3(9) does not include a building; but that does not appear material for purposes of corditio 4 so long as the alienation of the plot is involved. The lease of a building on such plot does include the lease of the plot as well. Consequently the lease of a building on such plot amounts to alienation of the plot within the meaning of condition 4. The order passed by the Collector forfeiting the holding is correct.

In the case of the agreement in the new Form executed by Mr. Bhagwantappa the term used is "land" and not plot. Consequently the difficulty raised in respect of the agreements int e old Form does not arise in this case. The order of the Collector forfeiting the holding is correct.

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U.R. to R.D.No. 6103 , dated the 11th June 1947.

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Although the lessee is a farmer of revenue the right conferred on him thereby amounts to a lease of immoveable property. "A lease which creaters a tenency for a term of years may confer on the lessee an option to take a lease for a further time. Such an option may be so phrased that the lessee is entitled to a fresh lease containing all the terms including the option to renew renew contain d in his original lease, inwhich case the lease is perpetually renewable. Unlike an option to purchase, an option to renew is not affected by the rule against perpetuities, even though the new lease is not to be in terms similar to those of the original one. An option to renewrenew runs with the land and with the reversion and so both the lessor's and the lessee's successors in in title are bound. If no time be stated in which the option is to be exercised the right to do so will continue so long as the relationship of landlord and tenant exists even though the renewal t rm has expired" (See Halsbury Vol. XX pp. 68-69). Whatever may have been the position before ~~1849~~ 1879 Government have by Government Resolution. R.D.No. 3224, dated 19-6-1879. clearly recognised the prescriptive right of the Thankor of Janor and directed that the lease of the two villages of Sadra and Kharàli should be renewd to the Thankor every seven years with a slight increase of rental to bar the right to hold on permanent settlement. Since then the lease is renewd from time to time and in none of these leases it appears has it been stated that onthe expiry of the lease the Thakor should yielf up possession. In the circumstance a co-venant for renewal can be spelt and the Thakor would be entitled to renewal of the lease from time to time unless by reason of contravention of the terms the lease is cancelled and thepossession of the village resumed by Government. The fact that the last lease expired on 6-5-46 and has not been renewed so far would be no valid ground for Government to withhold or refuse renewal.

d/- P.M.Lad
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D.O. Remembrancer of Legal Affairs.

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U.O.N. To R.D. No. 5730 dt. 31st May 1947.

Office of the R.L.A.

The relevant conditions of the lease in the present case are:-

(1) The lessees shall at their own expense and with due diligence completely reclaim the lands hereby leased so as to be in a state fit for use for agricultural purposes.

(2) The lessees shall reclaim at least one half of the said lands within ten years and the whole thereof within 20 years from the 1st day of August 1935 respectively and shall & maintain such reclamation during the residue of the term of the lease.

(3) - The lessees shall not until the whole of the said lands shall have been completely reclaimed and rendered cultivable, assign, underlet the said lands or any portion thereof or charge or receive any tax or fee for cattle grazing upon any portion thereof without the previous consent in writing of the Collector.

(4) The lessees shall not at any time partition, bequeath, alienate, assign, mortgage or otherwise charge or encumber or allow to becultivated used or occupied by any other person, any portion of the said lands less than the area of 20 acres hereby fixed by the Collector as an economic holding in respect of the said lands.

(5) If and whenever there shall be a breach by the lessees of any covenant condition or provision herein contained the lessor may re-enter upon the said lands or upon part thereof in the name of the whole and thereupon the lease shall determine.

The first question raised for the consideration of the R.L.A. is whether the fact of having allowed, after full reclamation of the whole area, 50 acres to be uncultivable involves the breach of the Lease.

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Under condition (2) the lessees shall reclaim at least one half of the said lands within ten years and the whole thereof within 20 years from the 1st day of August 1935 respectively and shall maintain such reclamation during the residue of the term of the lease. The lessees reclaimed the whole of the lands in or about 1937 although they could have waited a little longer. But having once reclaimed the whole area they are bound to maintain the reclamation during the residue of the term of the lease. They may however contend that they can again reclaim the uncultivable area of 50 acres before 1-8-1955; but such contention may not be accepted by the Court since such construction of the lease would be unreasonable.

The second question for consideration is whether on the assumption that the lands were fully reclaimed the sub-letting would be debarred if some of the lands again went out of cultivation through reclamation not being maintained.

On the landsbeing completely reclaimed and rendered cultivable sub-letting would be permissible under condition (3). The lessees are bound under condition (2) to maintain the reclamation. Consequently if some of the lands are after full reclamation allowed to go out of cultivationit may be a breach of admit condition (2) but would notbe a breach of condition (3)

The third question for consideration is whether the prohibition a any portion of less than 20 acres being cultivated a ed or occupied by any other person will apply to Kokarnams (service agreements) whereunder lands are given for cultivation on crop share basis.

Under condition (4, "the lessees shall not at any

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time allow to be cultivated used or occupied by anyother person any portion of the said lands less than the area of 20 acres hereby fixed by the Collector as an economic holding in respect of the said lands".. Condition 1 of the N karnama provides:

> "From the date.....mentioned above till the season of the samvat .....we bind ourselves to cultivate your land".

If the holding given for cultivation under the Nokarnama is less than 20 acres it would be a breach of condition (3) and it is immaterial whether such cultivation is by a tenant or a servant on the crop share basis.

On the first question what is necessary to prove is that the area of 50 acres of land has been allowed to be rendered uncultivable and relapsed into its former condition before reclamation. On the third question Government will have to prove that holdings cultivated under Nokernamas were less than 20 acres each. If Government decides to cancel the lease a notice to show cause may be given to the lessees and if the lessees give any reply the same may be sent to Legal Department for further consideration before forfeiting the lease and in the meantime the Collector may be instructed not to accept any rent from the lessees for the current year.

Sd/- D.V.Vyas

O.C. Remembrancer of Legal Affairs.

U.R. to R.D..No. 3160, dated the 1st April 1947.

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One Mr. S.S.Paregaonkar was serving as a Block Karkun on the work charged establishment at Kopargaon in Godavari, L.B.C., Sub-Division. He was discharged on the 10th March 1947 by the Executive Engineer, Nasik Irrigation Division, but as Government desired to continue him in se vice in some capacity or the other, on account of his having given evidence in a departmental inquir y, he was appointed as a Mustering Karkun on the work charged establishment at Pimpal-gaon Baswant in Nasik Irrigation Sub-Division . Before Mr. Paregaonkar could join that post, the post was abolished and subsequently he has been appointed as Mustering clerk in Chankapur in Kalwan Section of Malegaon Irrigation Division. This Paregaonkar, it appears, was occuplying Government quarters at Kopargaon and though he is repeatedly asked to vacate those quarters, has not done so so far. The Executive Engineer, Nasik has, in this connection consulted the D.G.P.Nasik who has advised as follows:-

"He (i.e. the D.G.P.) pointed out (relying on A.I.R. 1941 Cal. 60) that a Government servant occupying the Government quarters was a mere licensee and not a tenant. This license to occupy the quatters would be terminated on the retirement, dismissal or transfer of the Government servant, and it would be open to the licensor ( P.W.D.) to ask the servant to vacate and enter upon po session by use of some force, provided the number of persons thaking possession does not exceed four. This action can only

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be taken in the presence of the Government servant concerned. In the alternative, the Government Pleader suggested to file a suit in the Civil Court."

The Executive Engineer thinks that taking of forcible possession in the presence of the servant is impossible as presence of the cannot be secured. As regards suit he says that there would be no hope of getting the quarters vacated for another years. In the circumstances the R.L.A. is being requested to advise whether there is any other way out.

Relying on Corporation of Calcutta vs. Province of Bengal, A.I.R. 1941 Cal 69, the D.C.P., Nasik has held that Mr. Paregaonkar was only a licensee and not a tenant. This view of the D.C.P. appears doubtful. The case cited by him does not decide anything new but reiterates the well know principle that if the servant's occupation would be mere of his master's house be Ancilliary to the performance of his duties, which as a servant he has engaged to perform, then this occupation would be considered as that of the servant and not as tenant (cf. Woodfall's Landlord and Tenant p. 12). "But where labourers are permitted but not required to live in cottages on the terms that they are to give up possession when their employment ceases, and are either charged a reduced rent or the rent is deducted from their wages, the occupation has been held not to be by way of service but as householders" (ibid). It is not clear from the papers whether Mr. Paregaonkar's acceptance of his premises alongwith and occupation of the premises was subservient and

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and necessary to the service. Presumbaly it was not . In deciding whether a person's occupation of certain premises is as a tenant or as a servant the material points to be considered are (a) whether the person is required to occupy the house in question for the performance of his services. or (b) didhe occupy it in order to their performance. or (c) did he it was conducive to that purpose ore than any other house which he might have himself rented.

If Mr. Paregaonkar's occupation is held to be that of a tenant, then the only remedy available to secure possession of the premises will be that of a suit (cf. R.L.A.'s opinion No. 2281 , dated 26-3-1946). Even if Mr. Paregaonkar is treated as only a linensee . still forible eviction would be underirable and the proper course would be a suit (cf. section 6 of Specific Relief Act).

Sd/- P.N.Lad.
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O.C. Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 69-P-Suff-I cont'l , dated the 3rd October. 1947.

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The plaintiff's case is that even after the expiration of the lease on 31st May 1947 he is entitled to a renewal thereof by virtue of clause (5) of the lease, dated the 29th May 1944. The Revenue Department is therefore advised not to take any action while that question is still sub-judice. The view taken by the Revenue Department in paragraph 4 of its note at page 264 ante is not correct.

Sd/- D.V.Vyas.

O.C. Remembrancer of Legal Affairs.

U.R. to R.D..No. 7437. dated the 19th July 1947.

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The Thakore of Janod and his ancestors have been the lessees of the villages of Sadra and Kharoli since old times, that is since the days of the Scindia's Government of the Mahals followed by British acquisition. During the time of the Scindia's rule, these villages were farmed out to the ancestors of the present Thakore under quinquennial leases or pattas. The British acquisition took place somewhere about 1853 and since then annual leases were passed. Such annual leases continued till 1861. In 1861-1862 the then Ijardar refused to pass a writing to say that he had no xtxx right whatever in respect to these villages. The result was that the management of these two villages was taken away from the Ijardar. From 1861-1862 to 1866-1867 the management continued with the British Government. In 1867, however, the villages were restored to the Ijardar, and the lease was renewed by the order of the Revenue Commissioner who directed that the Ijardar be permitted to manage the villages till the introduction of survey settlement. Once more in 1873 the officer in charge of the Mahals refused to renew the lease as parathiraj the ancestor of the present Thakore failed to furnish security to make good the revenue derived from alienated lands. However, he subsequently fulfilled the condition, and the lease was again renewed to him pending the survey settlement. On 19th June 1879 Government Resolution, Revenue Department, No. 3828 was passed, which read as follows:-

> "Government are not prepared to ignore the prescriptive right of the Thakor of Janor to hold the ijara or farm of the villages of Sadra and Kharoli, though at the same time they do not recognise his right to the forests. He may be granted a seven years' lease of the cultivated lands of these villages, plus a certain area for increase of cultivation .....The lease should be renewed every seven years with a slight increase of rental to bar the right to hold on a permanent settlement. The forest lands may be treated as forest....."

The orders contained in the above G.R. were modified, as far as the period of the lease was concerned, by another G.R. Revenue Departmentl. No. 1671, dated 23-2-1884, which directed the renewal of the lease upto 31-7-1903. On the expiry of that lease, the question of renewal was deferred pending the general revision of the Godhra Taluka. Eventually, by G.R. No. 5214, dated 8-7-1904 the lease of these villages was renewed from 1-8-1906 to 31-7-1936. The lease was once more renewed for five years from 18-8-1938. The last lease having expired, the Thakore of Janod has applied again for renewal as usual, and the question has arisen whether he is entitled ~~AS A MATTER OF RIGHT TO THE RENEWAL OF THE LEASE OR~~ as a matter of right to the renewal of the lease of whether it is open to Government to refuse to renew the lease.

In his opinion No. 5730, dated 31-5-1947, the R.L.A. (Mr. P.M.Lad) opined that a covenant for renewal could be spelt and the Thakore would be entitled to renewal of the lease from time to time unless by reason of contravention of the terms the lease is cancelled and the possession of villages resumed by Government. H.M.(R.D.) condiders it very undesirable to continue such leases. H.M.(L) has been requested to consider if a way can be found to refuse renewal. H.M.(L) appears to doubt the correctness of the R.L.A.'s (Mr. Lad's ) opinion for the following reasons:-

(1) In the absence of any express covenant of renewal of lease, no right to such renewal arises. There can be no acquisition of such prescriptive right, since prescriptive rights relate to incorporeal and easement rights which obviously do not include leasehold rights.

(2) Whatever rights the Thakore's ancestors might have acquired during Scindia's rule lapsed when the territory was ceded t the British Government and could notbe relied upon in support of the Thakore's claim to the renewal

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of the lease.

(3) The G.R. of 1879 was merely an administrative order. It was purely an executive act. It was not a covenant and could create no contractual rights between the parties. Consequently it could not be relied upon by the Thakore in support of his claim for renewal.

It is a proposition borne out by law and sanctioned by authorities (Browne v. Tighe 1834, Bli (N. S.O 272 ) that a covenant for a perpetual renewal must be clear, plain and distinct and in terms that will not bear any other construction. In the case before us there has been no covenant at all at any time for a perpetual renewal of the lease . An obligation to renew leases cannot be inferred merely from the fact of renewal (A.G. v.St. John's Hospital, Bath 1865, 1 ch. Ap_. 92), although a presumption, dependent on the peculiar circumstances of each particular case, may be made in favour of a right of renewal where leases have been regularly granted for a long time. It will, therefore, be necessary to scrutinize the circumstances of this particular case and see whether any such presumption may be drawn in favour of the Thakore.

The lease granted to the Thakore in 1941 is at p. 109, of R.D. file No. 8241/33 of 1938. It is presumed that the leases granted previously were in similar terms. The preamble of the lease of 1941 states:

> "You , Thakore etc .are informed that mouze Sadra and Kharoli etc. were given to you on lease for five years from 1-8-1936 to July 31, 1941 in accordance with G.R. No. 8241/33, dated 18-8-1938. The period of lease having expired a fresh lease for five years from 1-8-1941 to 31-7-1946 has been drawn up in accordance with the Government Resolution No. 8241/33, dated 21-7-1941."

In all sixteen conditions are embodied in the lease. These relate to the payment of Government dues, the right to levy vighoti from tenants and the management

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of the village . The lease does not contain any express covenant for renewal nor does it provide for the surrender of possession after the expiry of the period of the lease. Consequently, the question for consideration is whether a covenant for renewal of the lease can be spelt out from a long and continual renewal of the lease and whether any right to renewal, enforceable at law , arises.

It appears that the Revenue Secretary who noted on 5-8-1938 at p. 14 of Revenue Department file No . 5241/33, and also theRevenue Secretary who noted on 10-7- 1947 at p. 26 of the Revenue Department file No. 4006/45 fell into the error of confounding lease with prescriptive right. It is to be understood clearly that lease and prescription are fundamentally different things (Compare section 105 T.P.Act. 1882 and section 15 of the Indian Easements Act. 1882). A lease is a contract, a covenant between the two parties. The possession of a lessee is in pursuance of that covenant. Apart from that covenant he has no right in respect of the land concerned. Prescription is a totally different thing. A prescriptive right accrues from a long, open, continued user. Uninterrrupted open enjoyment for a long time eventually matures into a prescriptive right which is independent of contract or any other law. It is, therefore, clear that the possession under a lease or a succession of leases, no matterthe length of the possession, can never confer a prescriptive right. It might be a hundred year old or a two hundred year old or even longer possession. But if it has been under a series of leases, there canbe no question of a right of prescription. Of course, if the lease itself contains a covenant for renewal, the matter becomes diffement . Then it assumes the character of a contract between the parties, and it is open to the lessee to insist upon his contractual right of having the lease renewed.. But in the instance before us it is an admitted position that in none of the leases (and there haves been quite a number of leases dating from the time of the Scindia's rule) was there any covenant for renewal.

It is of course true that the leases did not also state that, on the expiry of the period, the possession was to be surrendered by the Ijardar. But that can hardly help the Ijardar. In ordinary law, he is bound to surrender possession on the expiry of the lease, (see section 108(q) of the T.P.Act, 1882) and it does not matter a bit whether the lease says so or not. On the other hand, if the lease does not contain a specific covenant for the renewal thereof, the lessee will have no right of renewal. In short, therefore, it is not a circumstance of any real avail to the Thakore of Janod that since olden times he and his ancestors have been the farmers of these two villages of Sadra and Kharoli. Possession however longer under a lease or series of leases can confer no right for the renewal thereof.

The fact that the Thakore was a lease-holder under the Scindia Government for a number of years is of little or no consequence, since his rights whatever they might have been became extinguised on the territory being ceded to the British. Even in the days of the Scindia's rule, the leases were renewed quinquennially and apparently in none of the leases was there any covenant for renewal. That being so, no matter the length of the possession under these leases, it cannot create a prescriptive right to renewal. But even if we assume for the sake sake of an argument, without conceding it, that at the date of the British acquisition the ancestors of the Thakore of Janod had acquired a prescriptive right to the renewal of the lease, the position would still not help the Thakore. Whatever rights the ancestors of the Thakore might have acquired during the days of the Schindia's rule must be deemed to have been extinguished on the cession of the territoty to the British taking place. A similar question was considered by the Privy Council in Secretary of

.tate for India v. Pai Rajbai (53 Bombay 625). The judgment of their Lordships was delivered by Lord Atkinson who said:-

> "The relation in which they i.e. Kasbatis who were leaseholders under the last regime stood to their native Sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new Sovereign were those, and only those, which that new Sovereign, by agreement expressed or implied or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new Sovereign adopted, his recognition of their old rights, and express or implied obligation to respect them and be bound by them and it is only for the purpose of determining whether and to what extent the new Sovereign has recognised these ante-cession rights of the Kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become relevant subjects for inquiry in this case."

The same principle was accepted by the Privy Council in Vajesingji Joravarsingji and others v. Secretary of State for India (48 Bombay 613) where Lord Dunedin delivering They Their Lordships' judgment said in this manner:-

> "A summary of the matter is this: when a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as that sovereign has, through his officers, recognised. such right as he had under the rule of predecessors avail him nothing."

It follows clearly, therefore, that even if the ancestors of the Thakore had acquired a prescriptive right to the renewal of the lease of these two villages during the rule of the Scindia, such a right came to an end when the cession of the territory to the British Government took place somewhere about 1853. 1854

A relevant point at this stage is whether by an agreement express or implied the new sovereign i.e. the British Government had chosen to confer or respect a right of prescription at the date of the cession. The absence

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of any covenant of renewal in the leases which followed the cession is a very strong circumstance in favour of Government on this point. If Government had agreed to recognise the prescriptive right of the Thakore's ancestors, surely a covenant about renewal could have been inserted in the leases which followed the cession. The Thakore's ancestors would have insisted on such insertion; and the Government would not have refused the insertion if they had been really agreeable to respect the prescriptive right, if any. Not only do we not find any covenant of renewal in any of the leases consequent upon the cession; but on the contrary we find from the conduct of the Government and the Thakore's ancestors both that a right of prescription was recognised or claimed in respect of the lease of these two villages. Immediately after the cession, only annual leases were granted to the Ijardars who accepted them without any protest. This went on for something like seven years from 1854-1861. An annual tenant is hardly anything better than a tenant at will. In these circumstances, the fact that only annual leases of these two villages were accepted by the Thakore's ancestors immediately on the cession taking place from 1854-1861 shows that there could not have been any agreement express or implied between the said ancestors and the British Government about any right of the former to the British renewal of the leases and so far as legislation is concerned, there is of course none to support the Thakore's right to the renewal of the leases. The G.R. of 1873 can never be construed as a piece of legislation. This is obvious on the face and no more words are necessary. The net result, therefore, is that whatever rights the ancestors of the Thakore might have acquired in respect of these two villages during the time of the Scindia's rule came to an end and were totally extinguished upon the change of sovereignty took place in about 1853 or 1854. Subsequent passing of more annual leases to the Thakore's

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ancestor would show that the British Government was not prepared to recognised anything like a ligal right of the ancestor to the renewal of the lease.

What happended in 1861 or thereabout is also important. In that year, it appears that Government wanted the Thakore's ancestor to pass a writing to the effect that he had no right whatever in respect of these villages. The ancestor refused to pass a writing, with the result that the Government took overthe management of these two villages from him, and this state of affairs continued for something like six years. How this is really important. It would show that Government could not have agreed either expressly or impliedly, at the time of the cession, to respect anything like a right of prescription of the Thakore's ancestor to the renewal of the lease of these villages. It is quite true that the Thamore's ancestor declined to give a writing about his having no right to these villages. But that would not alter the fact that there could not have been any agreement between the Government and himself (at the time of the cession) to respect any such thing as a right of prescription to the renewal of the lease. Had there been such an agreement, Government would not have turned round only seven years later and demanded a writing to the contrary effect.

It is true that the possession was restored to the Thakore's ancestor in ~~1879~~ 1861. By 1879, however, this would amount to 12 years' possession whichcould never confer a right of prescription referred to in the G.R. of 1879. Obviously, therefore, the statement about the prescriptive right in the said G.R. is erroneous one. Such a mistake can always be proved and set right.

There might be a possible argument against Government refusing to renew the lease on the ground that the G.R. of 1879 would operate as an estoppel and would prevent Government from taking up the position which

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it wants to take up. Such an argument cannot hold water and must fail immediately.

In Municipal Corporationof Bombay v. S. of S. (7B .R. 27) the question of the legal effect of a Government Resolution arose. In that case by a resolution dated 9-12-1867 Government sanctioned the application of the Municipal Commissioner for a site for stabling as expressed in para 5th of this letter on the terms proposed by the Architectural Improvement Committed in paragraph 1 of their letter . The Municipality relied upon the G.R. in support of its right to theland. Jenkins C.J. did not accept that contention and in repelling it he relied on the ~~contentionand in repelling it e~~ provisions of 22 and 23 vic C. 41 whereunder the Crown property couldbe disposed of (in the the manner prescribed and that the Resolution which purported to be a disposition did not conform with theprescribed requirements, observing "I think that a disposition of Crown lands by Governor in Council was dependent for its validity on an adherence to the forms pres ribed and that therefore the Resolution was not a valid disposition of the property." It was next argued on behalf of the Municipality that if the Resolution was ineffective as a disposition it was good as a contract. The chief ~~a d~~ Justice did not accept that contention holding that the Resolution regarded as a contract was equally open to objection that the statutory formalities had notbeen observed. It was further contended by the Municipality that section 115 of the Evidence Act or that the principle it embodied cured the informality. Even ~~Then~~ that contention was rejected by the Chief Justice observing:

> "The doctrine involved in this phase of the case is often treated as one of estoppel, but I doubt whether this is correct though it may be a convenient name to apply. It differs essentially from the doctrine embodied in section 115 of the Evidence Act which is not a rule of equity but is a rule of evidence that was formulated and appli d in co rts of law".

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The Government Resolution of 1979 recites about the renewal of lease every seven years. As a right to renewal of lease runs with the land, it can be treated as an interest therein. A disposition of any interest in the Crown land was required to be done in accordance with certain formalities which the Government Resolution does not satisfy. Consequently that Resolution cannot be relied on the support of the right to renewal. Nor can it create any contractual relationship on a topical applicant Government. Further a Government Resolution is in the nature of an administrative order which being unilateral can create no rights in favour of a third party to whom the G.R. is neither addressed nor a copy of it endorsed to him. . The Government Resolution of 1979 being of that nature, therefore one claim a right to renewal thereon. In short, both on facts and in law, the Government Resolution of 1979 can have no binding effect on Government.

In conclusion, having considered the legal position and having reviewed the pertinent authorities carefully, I am of the opinion that the tenure of land has no legal right to have the lease renewed and that it is perfectly open to Government to refuse to renew the lease to him.

D.V. Vyas.

D.C. Kemembranner of legal affairs.

U.O. to R.D.Co. 338-Confl. dt. 6-8-1947

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Office of the R.L.A.

Government is not bound by the provisions of the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944. (R.L.A.'s opinions No. 6577 dated 29-9-1943 and 9208 dated 18-12-1946). Consequently there is no substance in the contention of Messrs. Mulla & Mulla, Solicitors, and there would be no objection to evicting the Ladies Gymkhana.

The Collector in his letter, at page 109 ante, has suggested that the word "possession" should be substituted for the words "removal of Government control over building materials" in clause (c) of G.R.(R.D.) No. 868/39II dated 21-2-1946. The modification appears necessary and may be done provided the lessee has no objection.

By G.R. R.D No 868/39-II dated 21-2-1946

Government accepted the offer of Mr. Jhari Ram Bhadani and accorded sanction to the grant to him of the land on a lease for 999 years subject to certain conditions, and the Collector was requested to convey Government's orders to Mr. Jhari Ram Bhadani through Messrs. Junnarker and Gupte. It is presumed that the Collector accordingly did convey Government's orders to Mr. Jhari Ram Bhadani. If an agreement by correspondence can be spelt out, the fact that no formal lease has yet been executed would be no valid ground to justify Government's rescission of the contract.

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O.C. Remembrancer of Legal Affairs.

U.R. to R.D.No. 8789, dated the 29th August 1947.

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The relevant clause of the lease of 1882 runs as follows:

"The lessee shall not nor will during the said term make any such disposition of t e said land hereby respectively demised or any part thereof respectively as shall has the effect of vesting the same respectively for the said term or any part thereof in other than one and the said party or parties at one time without the sanction of the Governor of Bombay.

It is clear that this provisi n prohibits the sub-lease of the whole or part of the land as well as the assignmentof any part of the land. It appears from the collector's statement at page 23 ante that the land covered by the lease measured 17077 square yards comprising part of city S. No. 109 and city S.Nos. 110, 111 and 37 and that city S. No. 379 was disposed of by the lessee in 1883 wi h the sanction of Government and since then it has changed hands more than four or five times, but at no time has it since been sub-divided. If so, no sanction of Government was necessary under the lease to the purphase of that plot C.S.No. 379 by Hasanalli and his wife in 1933. The view then taken by Government is correct.

Furthermore, even assuming that the sanction of Government was n cessary to such sale, no objection can now be taken thereto as by accepting rent of the land thereafter and by entering the names of purchasers in rent rolls Government could be presumed to have waived its objection.

For the same reasons stated above no objection can be taken to t e subsequent disposal of C.S.No.110 provided Government's sanct i n was obtained when the original lessee disposed of it and it has not since been subdivided.

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O.C. Remembrancer of legal Affairs.

U.R. No R.D.No. 9178, dated the 13th September 1947.

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Mal-Mining Lease granted to the Associated Cement Companies.

The Managing Director of the Associated Cement Companies, Ltd. in his letter at page 179 states:

"According to one of the terms of the lease, we shall have to erect the Cement Factory within a specified time. As doubts were expressed with regard to the suitability of the limestone for cement manufacture, we requested the Bombay Government to give us sufficient time to carry out certain tests in America on the raw materials of Tackeshvar, in order to see if by any special process it would be possible to remove the high iron content from the limestone and thereby make it suitable for cement manufacture The Bombay Government acceded to our request and modified the clause relating to the erection of the the cement factory within a specified time. The modified clause (Clause 2 of Part VII of the lease) reads as follows:-

'The lessees shall be allowed one year from the termination of the war or the date (which should be reported to Government) on which shipment of all the necessary samples of raw materials to America for investigation of their suitability for manufacture into Portland Cement is made, whichever is earlier and unless they have given notice within the said period to Government that the tests taken show that the raw materials are unsatisfactory or that the process of manufacture is uneconomic uneconomic and asked for a cancellation of the lease, the lessees shall erect and maintain a factory on the said lands for the purpose of manufacturing the said materials into cement and start manufacture of cement within three years from the expiry of the said period of one year.'"

P. It is undisputed that the aforesaid modified clause of the lease was intended to enable the A.C.C. Ltd., to takes tests in America with regard to the suitability of the limestone for cement manufacture. Consequently, "tests" in the modified clause of the lease prima facie relate to tests to be taken in America. The A.C.C.Ltd., did not sent samples of raw materials to America for investigation . it is more than one year since the war terminated. The notice

given within the period of one year from the date f th termination of war that the tests taken in India did not disclose the suitability of the material for manufactue into Portland cement cannot be considered a valid notice within the meaning of clause 2 of the lease since tests contemplated under that clause are tests to be taken in America. Moreover, the stipulation is that not only has the lessee to give notice as provided during the period of one year but that he must also ask for the cancellation f the lease . In their letter dated the 29th March 1947, the A.C.C.Ltd. say in unequivocal language that they have no desire to ask for the cancellation of the lease. The lessees have thus committed a breach and are liable to erect and maintain a factory as provided in clause 2 of the lease. The view taken by the Department of Industries at page 187 ante appears to be correct.

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O.C. Remembrancer of Legal Affairs.

U.K. to H.D.No. 9564. dated the 29th September 1947.

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Office of the R.L.A.

The R.L.A. presumes that Civil Appeal No. 33 of 1946, which was dismissed for default must have been the appeal against the lower Court's Order dismissing the plaintiff's application for interim injunction. (See his Memo. to the D.G.P. and the D.G.P's reply thereto which does not expressly contradict the presumption). Since no interim injunction was granted by the Court and the collector has already taken possession of the land from the plaintiff, Government's orders dated the 26-8-47, need not be given effect to by restoring the land to the plaintiff, for it would be open to the plaintiff to amend his plaint and ask for possession.

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O.C. Remembrancer of Legal Affairs.

U.R. to R.D.No. 10619, dated the 6th November 1947.

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Acceptance of rent by revenue officers - Whether forfeiture is waived.

Transfer of Property Act, section 111(g).

It appears that the rent of the current year, 1946-47, has been accepted by the revenue officers on xxx 8.4.1947, before the receipt of the Government orders not to accept rent from the lessees. The question raised for the consideration of the H.L.A. is whether by reason of receipt of rent by the revenue officers from the lessees the forfeiture of the lease is waived.

2. Clause (g) of section 111 of the Transfer of Property Act provides for the determination of a lease of immoveable property by forfeiture; that is to say,- (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease. Section 112 provides "A forfeiture under section 111, clause(g) is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting: Provided that the lessor is aware that the forfeiture has been incurred: Provided also that where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, forfeiture, such acceptance is not a waiver." It follows therefore that acceptance of rent

Even section 112 do not apply to leases of Government agricultural lands still the principle enunciated these sections does apply to such leases. In the present case the rent for the year 1946-4 was received on 8-4-1947 by which date it had already become due. The breaches of conditions of lease had occurred prior to 8-4-1947 and it appears that the revenue officers who received the rent from the lessees knew of the breach of the condition of the lease involving its determination by forfeiture. No doubt the revenue officers cannot be considered the lessors but as authorised agents of Government the receipt of rent by them would be considered as receipt by Government itself. Consequently the receipt of rent by revenue officers on 8-4-1947 after forfeiture of the lease was incurred would amount to waiver of the forfeiture. It appears from the letter of the Solicitors of the lessees addressed to the Collector of Breach in reply to the notice to show cause why forfeiture of the lease should not be ordered, that the plea of waiver of forfeiture on the ground of receipt of rent has not been taken up. But that would not estop the lessors from challenging the forfeiture on that ground in a Court of Law. In the circumstance it appears that Government is not likely to succeed if the matter is taken to the court of Law.

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due on a date after the forfeiture is incurred is a waiver of forfeiture because acceptance of the rent is an affirmance that the lease was subsisting at the time when the rent became due. (See Mulla's Transfer of Property Act, 2nd edition, page 659). Although the provisions of section 111 clause (g) and section 112 do not apply to leases of Government agricultural lands still the principle enunciated in these sections does apply to such leases. In the present case the rent for the year 1946-4 was received on 8-4-1947 by which date it had already become due. The breaches of conditions of lease had occurred prior to 8-4-1947 and it appears that the revenue officers who received the rent from the lessees knew of the breach of the condition of the lease involving its determination by forfeiture. No doubt the revenue officers cannot be considered the lessors but as authorised agents of Government the receipt of rent by them would be considered as receipt by Government itself. Consequently the receipt of rent by revenue officers on 8-4-1,47 after forfeiture of the lease was incurred would amount to waiver of the forfeiture. It appears from the letter of the Solicitors of the lessees addressed to the Collector of Bronch in reply to the notice to show cause why forfeiture of the lease should not be ordered, that the plea of waiver of forfeiture on the ground of receipt of rent has not been taken up. But that would not estop the lessors from challenging the forfeiture on that ground in a Court of Law. In the circumstance it appears that Government is not likely to succeed if the matter is taken to the court of Law.

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With regard to the breach of condition No. 4 of the lease, that is to say, allowing to be cultivated, used or occupied by any other person any portion of the leased lands less than the area of 20 acres thereby fixed by the Collector as an economic holding in respect of the said lands, the contention of the lessees is that they had paid fees for getting the plots demarcated and they could not be penalised for failure of the local officers to so demarcate the said lands. There is no substance in this contention. They might have paid the necessary fees and the officers also might have delayed demarcation of the lands, but that would be no valid reason for the lessees to commit a breach of condition No. 4. They could have either cultivated the lands themselves or employed a private surveyor and demarcated provisionally the holdings of the necessary size, size and thus fulfilled condition No. 4.

With regard to the breach of condition No. 2 of the lease which requires the lessees to maintain such reclamation during the residue of the term of the lease the lessees contend that the whole of the land is in cultivable condition and that they are prepared to sow on any portion of the land anything that is ordinarily grown in the Mandva-Matied villages in order to show that the land is cultivable. The Collector who has seen the land is of the opinion that half the leased land is at present under cultivation and the rest is lying waste with wide growth of grass for several years and is an estate not fit for immediate cultivation. It may be possible to bring this portion of the leased land under cultivation provided a considerable amount of labour and expenditure is used to make it fit for cultivation. The intention of condition No. 2 is to require the lessees to maintain such

reclamation i.e. to say to keep the land fit for cultivation. It is one thing to say that the land can be brought under cultivation provided more money and labour is expended over it. but it is an other thing to say that the land is fit for cultivation . The land can be considered to be fit for cultivation only if crop could be grown without extra expenditure of money and labour. To allow a reclaimed land to lie waste amounts to defeating the intention of condition No. 2.
According to the Commissioner patches of salty soil which have been allowed to relapse into a state unfit for immediate cultivation measure only 7 gunthas. Obviously this area is negligible and it is not possible to contend that the lessees by reason of these patches of salty soil having been allowed to relapse. have committed any breach of the condition relating to the maintenance of reclamation. If however Government desires to forfeit the lease on other grounds the breach of the condition No. 2 may also be included as one of the grounds.

In the last para. of Secretary , R.D.'s at not at pages 74-75 ante the A.L.A. is requested to indicate any further lines of investigation or collection of information and evidence in order to enable Government to come to a just and correct legal decision as to the proper performance or breaches of the lease in question. As the receipt of rent by the revenue officers on 8-4-1947 after the forfeiture of the lease incurred is fatal to any action by Government to determine the lease by forfeiture, no further investigation or collection of information ~~collection as to t~~ as and evidence appears necessary.

Sd/- P.N.Lad
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C.C.Memembrancer of Legal Affairs.

U.O. to R.D. No. 10827. dated the 14th November 1947.

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Vikhorli is one of the two villages leased to Mr. F. C. Banajee from the year 1834/35 perpetually subject to certain conditions. Clause 4th of the lease inter alia provides:

> "You are not at liberty to dispose of in any way whatever the above villages to any other person within the period of 10th years.

Clause 17th of the lease provides:

> "The above villages are granted to you and your heirs in perpetual farm on the above conditions, & liberty to transfer after the expiration of ten years from the date of this lease, with this reservation that the farm of each village is to be held by one individual as an undivided property and is in cases of succession to be considered as concerns Government the property of the head of the family or of the individual to whom it may according to law be assigned by the last proprietor. You are prohibited from transferring these villages to a person whose respectability and possession of capital have not been proved to the satisfaction of Government should you transfer these villages without the sanction of Government, it will be at liberty to cancel this lease and to resume the villages."

The present holder of the village of vikhroli with the sanction of Government is one Naoroji Pirojsha.

Messrs. Paunee & Co. on behalf of their clients

Messrs. Godrej & Boyce Manufacturing Co. Ltd. have applied to Government for permission to allow their clients to purchase the leasehold village of Vikhorli from its present lessee Naoroji Pirojsha. The Collector of Thana and the Commissioner, N.D. doubt whether Messrs. Godrej & Boyce Co. can be considered to be an individual within the meaning of clause 17th of the lease. The question raised for the consideration of the R.L.A. is whether the view taken by the Collector of Thana, and the Commissioner, N.D. is correct.

2. Clause 4th of the lease prohibitdd transfer of the

of the villages to any other person within the period of ten years from the commencement of the lease. This clause therefore implies no restriction on the transfer of the villages to any person after the expiry of these years. This implication is made explicit under clause 17th.

3. Clause 4th prohibits transfer of the village to any other person and the latter part of clause 17th prohibits transfer of villages to a person whose respectability and possession of capital have not been proved to the satisfaction of Government . In the case of Willmott v. London Road Car Company, Limited, 1910, 2 Chancery Division, 369, it was held that even under a covenant, as in a Statute, the word "person includes a corporation such as a limited company. In that same case it was further held that a limited company was capable of being a respectable and responsible person within the meaning of the covenant. Mainly upon the authority of this case it is now an established proposition in English law that a limited company is capable of being a respectable and responsible person within the meaning of a covenant, unless the language of the lease shows that it is to be held by an individual. See Hill's Complete Law of Landlord and Tenant 9th edn. p. 436, and Halsbury's laws of England, Vol. 20, 1936 edn. p. 358. The word "person" occurring in the 4th and the 17th clauses of this particular lease can, therefore, be extended to include a corporation such as a limited company, and upon the authority just cited, we would have to say that the qualifications of respectability and possession of capital can be held also by a limited company.

4. Clause 17th contains the further reservation that after the expiry of 10½ years from the date of this lease the farm of each village should

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be held by one individual as undivided property and and in cases of succession to be considered as concerns Government the property of the head of the family or of the individual to whom it may according to law be assigned by the last proprietor . "Individual" as a noun denotes a single single person as distinguished from a group or class, and also very commonly, a private or natural person as distinguished from a partnership, corporation or association; but it is said that this restrictive signification is not necessarily inherent in the word , and that it may, in proper cases, include artificial persons. (See Blank's law Dictionary 3rd edn. p. 953). Thatm no doubt, is the American view. That the view prevailing in English jurisdiction is not different can be gathered from the following passage from Wright J's judgment in Great Northern Ry . Co. v. Great Central Ry. Co. 1899, 19 Ry. & Can. Tr. Cas. 266 at p. 275 where the words "public or any individual" were construed:

> "It seems to me that the word 'individual' must be construed as extending not merely what is commonly called an individual person, but to a company or corporation- individual seems to me to be any legal person who is not the general public."

This extended meaning of the word "individual" like that of the word "person" can be imported even in a conveyance.

5. There is otherwise nothing in the terms of the lease which would suggest that it was intended to be held only by an individual i.e. a natural person as opposed to an artificial legal person; for, it is legally quite feasible for a company to hold the village as an undivided property.. The holding of the village by a company is not opposed to the intention underlying clauses 4th and 17th . In these circumstances it would seem that the term "individual" in clause 17th appears

to have been used in its wider signification including artificial legal persons such as companies.

6. There should, therefore, be no objection to the transfer being made to Messrs. Godrej & Boyce Manufacturing Co. Ltd. provided the present holder of the village approaches Government for sanction in that behalf and provided Government is satisfied about the respectability and the possession of capital by the company.

Sd/- P.H.Lad
21-11-47.

C.O. Research Officer of Legal Affairs.

U.O. to R.D.No. 11150, dated the 21st November 1947.

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The proposal of Secretary, E.& I.D., to allow the Trustees of the Institute to enter into the possession of the land in dispute under a joint lease from Government and the Port Trust is not feasible as it would imply unity of title and interest so as in law to confer upon the joint-lessors equal shares in the joint estate and the unity of possession of every part as well as of the whole . In the present case title to the land in dispute does not vest jointly in Government and the Port Trust but each of them is claiming exclusively of the other and neither is in possession whether actual or symbolic.

It is, however, possible to make the proposal feasible if, without prejudice to their respective rights and contentions, the Port Trust and Government enter into agreement whereby Port Trust should agree-

(a) to allow Government to deliver possession and also to grant a lease of the land in dispute to the Trustees of the Institute upon the terms, conditions and provisions to be previously approved by the Port Trust, including a provision that in the event of the title of the Port Trust being upheld, the Port Trust shall be entitled to the reversion as well as all the rent and benefit of the covenants in the lease since its commencement and that Trustees of the Institute shall be bound to attorn tenants to the Port Trust as if the lease was originally granted to them by the Port Trust and

(b) for the safety of the trustees of the Institute to join in the execution of the lease as a confirming party.

Proposal in paragraph 2 above, will estop the Port Trust from contesting the lease and the Trustees of the Institute from contesting the title of the Port Trust at a later date.

Sd/- E.T.K.

O.C. Remembrancer of Legal Affairs.

U.R. to ~~XXX~~. E.& I.D.,No. 13044, dated the 14th December 1947.

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Office of the R.L.A.

STATEMENT OF THE CASE.

In order to grasp the real point of difference between the Bombay Gorakshak Mandali and Government it appears necessary to trace the full history of the case, which takes one far back to the year 1887. The facts are these:-

In 1830-31, the village of Akurli along with two other villages of Chinchcli and Dindosi in taluka Salsette, was granted on lease to one Mr. Laxman Harrichunderjee, subject to the terms and conditions contained in the said lease. It appears that in the year 1887, Mr. Vinayak Ramchandra Laxmanjee, a descendant of the original Khot, assigned in perpetuity the Sutidari rights held by him in the villa e of Akurili to one Mr. Krishnarao Ramchandra Madgaonkar, reserving to himself the rights of removing stones from certain hills in the village and also the right of recovering compensation from Government in the eventuality of Government acquiring the said hills.

vide pp.76-81 of Govt. selection Cl. XXX Series.

vide page 106 of D.D. file No. 21-B/20-Pt. II .

It furkher appears that by the mortgaged-deed dated 3-9-1888, Mr. Vinayak Ramchandra Laxmanjie mortgaged all his khoti rights under the kowl of 1831, to M/S. Ibrahimbhoy and Allarakhya. In the year 1894, Ibrahim and Allarakhya sold their rights, title and interest in the mortgage to one Mr. Chhabildas Lallubhai. In 1895, Mr. Chhabildas instituted a suit in the Bombay High Court against the khot and obtained a decree for foreclosure. In the year 1897, Mr. Krishnarao Ramchandra Madgaonkar, who had acquired the Sutidari rights, sold the same to the Bombay Gorakshak Mandali.

Ia- vide Do.

Chhabildas Lallubhai died in the year 1921, bequeathing the village of Akurli to his widow, Kesarbai, and two sons. On 23-3-1921, Bai Kesarbai and her two sons sold their rights as khot to the Bombay Gorakshak Mandali with the sanction of Gorvernment.

pp.106-10 of D.D. file No. 21-B/20 Pt. II.

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pp.126 of D.D. file 21-B-20 Pt.II

In July 1920, certain land in the village of Akurli, since held by the Bombay Gorakshak Mandli as khot, was notified for acquisition for quarry purposes in connection with the Back Bay Reclamation Scheme. Subsequently, in February 1921, certain other land was also notified for acquisition for the same purpose. The Mandli's land as finally acquired admeasured 151-39-12 (A G As.) and the Collector, Bombay Suburban District, awarded as compensation a sum of Rs. 64.942-7-6, including 15 p.c. solatium. The Mandali, being dissatisfied with the award of the Collector made a reference to the District Court, Thana, under section 18 of Land Acquisition Act, 1894. Negotiations for amicable settlement of the amount of compensation were set on foot and compromise was arrived at after about four years. The terms of settlement as finally sanctioned by Government and communicated to the Mandali in D.D. letter No. S.A. 766, dated 2-5-1924, are these:-

*p.p. 129-131 of D.D. file 21-B 20 pt. II.

> "(a) The 125 acres of land at Trombay shown on the plan accompanying your to the L.M.,D.D.,No. 277, dated 15-8-1923, should be handed over to the Trustees in exchange for their land at Akurli, and that the Trustees should enjoy the same rights over the new land at Trombay as they possessed over their land at Akurli (the above 125 acres are exclusive of the strip occupied by the Tata Hydro-Electric Power Supply Coy. Ltd. for its transmission line).
>
> (b) That a sum of Rs. 50.000 should be paid to the Trustees in cash over and above any sums that may have been paid already.
>
> (c). (d). (e). x x x x x x x x x x x x x x x x x x x".

These terms were approved and accepted by the Mandali and its approval was communicated by M/s. Madhavji & Coy., in their letter No. 4282/24, dated 8-5-24. The terms of settlement, as accepted by the Mandali, were finally approved by Government (vide G.R., D.D.No. S.A. 570, dated 23-5-24) As stipulated in condition (a) of the Settlement, Government acquired 124-31-4 (A G As.) of land at Trombay in exchange for land acquired by Government at Akurli and delivered over the possession of the same to the Mankali (vide G.R. D.D.No. S.A. 2173, dated 3-12-1927).

vide p. 134 of D.D. file 21-B 20 Pt. II. & 144 Do. slip Z.

pp. 193-164 of D.D. file 21/20-B Pt. II.

Before, however, the lease in respect of the land at

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Devnar (Trombay ) c uld be executed. It appears that the Mandali again moved Government with the proposal to return the land at Akurli with some extra land in exchange for its land at Devnar (Trombay). As, however, Government required the whole area at Kandivli Quarry Settlement measuring 2 2?3-8 acres along with the buildings for the Training Institute for Physical Education (vide D. .. r.t.D. No. 855/36, dated 12-4-40), the request of the Mandali for return of the land could not be accepted. Consequently, the question of settling the terms of the lease of land at Devnar was taken up and a draft lease, prepared by the Solicitor to Government in the Legal Department was forwarded, through the Collector, Bombay Suburban District to the Mandali for execution. The Solicitors of the Mandali, however, made certain amendments in the draft lease, the reasons in respect of which are stated in the letter No. 160 /41, dated 15-5-41, from M/s. Madhavji and Coy., Solicitors of the Mandali. These grounds were considered by the Solicitor to Government and the draft lease was suitably modified (vide Solr's n.r. No. 5530, dated 23-6-41) The grounds on which the lease was so revised were communicated to the Collector, Bombay Suburban district in memorandum No. 5319, dated 15-7-42. The Collector, Bombay Suburban District, communicated to Messrs. Madhavji and Coy. the contents of the aforesaid Government Memorandum and they were requested to obtain the consent of the representatives of the Mandali to execute the amended lease, but inspite of repeated reminders, the Mandali deferred execution of the lease.

pp. 13-, 15-16 and 19-24 ante.

pp. 113-114 ante.

vide p. 135 ante.

pp. 123-132 ante. vide pp. 165-166.

161 Do

165 ante.

vide p. 169 Do.

vide p. 233 e.

2. From the discussion with the Solicitors and Counsel of the Mandali, it appears that the only clause which they want to dispute is clause 10 of the draft lease pertaining to the right of Government to minerals. As stated by the Secretary, Revenue Department, the Mandali contends as follows:-

vide p. 263 ante.

p. 263 ante.

> "As clause 2 of the Akurli lease vested all the rights possessed by Government in the west land in the lessee except such as might be specially excepted in the lease, the mineral rights also must be deemed to be transferred. Government takes

Its stand on clause 12 of the Akurli lease which declaures the lessee to be the farmer of revenue. Mr. Taraporewalla relied steongly on 36 Bom. L.R. p. 761 for supporting his case. This certainly appears to support his case".

The matter is, therefore, referred to the E.L.A. for advice whether in view of the decision in 36 Bom. L.R. p. 761. the claim of the Mandali to the mineral rights should be conceded by Government.

D.D. file No B Part II of 1924-26 pp.110-111

3. In his opinion No. 14 dated 29th February 1924, the Advocate General (Mr. J.B. Kanga) opined that the lessee under the lease has all forest rights to trees and to the quarries and minerals in 3/4 ths of the waste land. In 1932, the question about the levy of non-agricultural assessment on the land covered by the lease was considered by the E.L.A. in his opinion No. 4240 , dated the 20th August 1932; and the Advocate General who was also consulted agreed that 116 acres of land faling within 3/4ths of the waste land under the lease could be held by the Trustees free from assessment. While forwarding this opinion of the Advocate General to Government the E.L.A.( Mr. Davis) inhis opinion No. 4754, dated 21st September 1932, opined that the Mandali (Trustees) being merely the farmer of the revenue were granted no mining or subsoil rights in the original kowl. It appears that on the basis of this opinion of the E.L.A. that the Governments claim to the mines and mining rights in the Trombay land is grounded; but the Trustees take their stat stand on clause 2 of the lease whereunder all rights possessed by Government in waste land have been transferred to the lessees except such as might be specially excepted in the lease and are claiming ~~mineral~~ mineral rights.

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4. In the operative part of the lease it is clearly provided that the village is leased to the lessee exclusive of the Abkari during the year 1830-31 and the relevant clauses of the lease are as follows:-

Clause 2(As amended in 1841)- All the rights possessed by Government in the waste of the above villages including the waste land and trees and produce thereof except such as may have been specially excepted in this

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lease are vested in you. Thereyou are to enjoy free of assessment for a period of 40 years from the date of the original lease at the expiration of which 1/4 th part of the available waste will be fully assessed at the usual khari rates, whether under cultivati n or not and the remaining 3/4ths of the said waste is subject to no condition, you being allowed to make any use you may be pleased of it during the term of your lease and the amount of such 1/4th part of the assessment will be levied from y u annually by Government in addition to the aforementioned sum of Rs. 775-1-3.

Clause 12:--In respect of the above named village y u are considered the farmer thereof and are to possess and exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may be hereafter vested in them and to be subject to such penalities as are now or may hereafter be provided by Regulation.

5. Relying on clause 12 of the lease and the decision of the Bombay High Court in Haji Abdulla v. Secretary of state for India (13 Bom. L.R. 883) the K.B.A. in his opinion of 1930, held that the Trustees being mere farmers of revenue were not entitled to mines and minin rights in the Trombay land. This opinion of the K.B.A. has got to be examined in view of the High Court decision in the Secretary of state for India v. Faredoon Jijibhai (36 Bom. L.R. 761) and the Advocate General's opinion of 1924. In the case of the Secretary tof state v. Faredoon the lease granted by Government of the village of Mahul was considered. That lease also provided forthe grant of part of the village and the remainder of the Inamdar. That lease Clause 1 provided that the revenue of the village without Abkari revenue was granted. Clause 2 ran thus: "In the said village some lands are uncultivated and some trees are barren. And Government has rights over the said lands and trees and over the income thereof. Out of the same Government has retained some right mentioning the same in the Kowl (lease). Except that right the khoti ht has been granted to you. You should go on enjoying the same". Clause 11 read thus:

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> "You have become Khots of the aforesaid Mouje and you possess such authority to exercise powers and to carry on vahiwat there as is given to a Khot under Chapter VI of Regulation X II of 1827 of y u will get such authority as may be hereafter conferred on Khots. If you should fail to carry out the terms of settlemtnt y u will be liable to punishment such as is now or may hereafter be provided for by law."

6. One of the questions raised in that suit was whether under the lease the lessee was entitled to all mines and mineral rights in the village and the case of Haji Abdulla v. The Secretary of State for India (13 Bom. L.R. 883), in which it was held that the grant did not amount to an alienation was relied on by Government. Negativing the contention of Government Justice Divatia held (1) under the grant the grantee was given part of the village absolutely in inam and part in farm, meaning by the expression the right to sell its revenues on payment of a yearly assessment while reserving only the excise revenue; (2) that minerals and trees in varkas land belonged to Government even before the Bombay Land Revenue Code, and therefore the right to royalty must be deemed to have been conveyed under the lease. The following observations of Justice Divatia in this connection may be quoted with advantage:-

> "The learned Advocate General has placed strong reliance on a decision of this court in the case of Haji Abdulla v. Secretary of State for India in which it was held on the facts of that case that the grant did not amount to an alienation. It is to be observed that in that case the grantee was to bring the lands under cultivation within the period of forty years and the assessment was to go to Government, that it was competent to introduce a new survey and assessment irrespective of the wishes of the grantees. There was no condition there similar to condition No. 2 in the present grant, and the decision is confined to the facts of that case only. Although I feel a certain amount of doubt as to the correctness of that decision even on the facts of that case, it is not necessary to discuss it further because the facts in the present case are materially different from those in that case, and if the grant here is to be construed with any other grant, the present grant is more similar to the grant in Vadia's case than the grant in Haji Abdulla's case".

It is therefore apparent that the absence of

condition 2 in the lease in Haji Abdulla v. the Secretary of State appears to make a lot of difference. The mere fact that the lessee is considered to be a farmer under th clause 12 of the lease in the present case does not mean that the lessee is merely a farmer of revenue and is not entitled to any other rights which have been granted to him specifically under clause 2 and the preamble of the lease. Even in the lease in the case of Secretary of State v. Faredoon it was provided that the lessee in respect of the village was a Khot. A Khot is essentially a farmer of revenue . Consequently the fact that lause 12 of the lease, in the present case, states that the lessee is a farmer of the village, does not appear to make much difference when the other provisions of the lease are explicit. I am of opinion therefore that the decision of the Bombay High Court in the case of Secretary of State v. Faredoon applies to the present case and the lease will include the royalty of Government - to mines and minerals . The view taken by Mr. Paraporewalla appears to be correct. However, in view of the difference of opinion between the A.G.A. (Mr. Davis and the Advocate General Mr. K. Manga as stated above, the present Advocate General is re-quested to favour Government with his opinion very rugently.

Sd/- S.A.K.
5-9-1947.

C.C. Remembrancer of Legal Affairs .

U.O. to the Advocate General Bombay No. 9045. dated the 6th September 1947..

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Advocate General's Chambers .
High Court,
Bombay . 10th October 1947.

U.O.R. to the Advocate General of Bombay,
No. 9046, dated the 6th of September 1947.

****** ************

Opinion.

As the facts have been fully set out in the statement of the case by the R.L.A., it is not necessary for them to be set out again in this opinion. The question involved really is whether when the lease of the Akurli lands vested all the rights possessed by the Government in the waste land in the lessees except such as might be specially accepted in the lease, the proper construction is not that every possible right including the mineral rights unless s-pecially ~~excepted except~~ accepted must be taken to have passed to the lessee. Had it not been for the words "except such as might be specially excepted", the matter might have presented some difficulty and clause 12 of the kowl might have been capable of having full effect. The excepti.n however, is the effect of passing definitely every ri ht including mineral rights, because these rights have not been specially excepted. The case in 36 Bom. L.R., 761 and in particular reasoning in the judgment of Mr. Justice Divatia applies fully to the Akurli lease, and I agree with the opinion of the R.L.A. as also the opinion of Mr. Tarapor ewalla mentioned in the statement of the case that the mineral rights passed to the lessee.

Sd/-C.K.Daphtary

Advocate General .

U.O.R. to R.D.No. 10142, dated 21-10-1947.

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